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No. 77-1096

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT E. FEENEY, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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This petition was filed on February 3, 1978, ninety-two (92) days after the court of appeals entered the judgment which the petitioners seek to bring before this Court for review. The time for filing a petition was not extended. Accordingly, the petition was not filed within the ninety-day period allowed by law, and this Court lacks jurisdiction to entertain it. 28 U.S.C. 2101(c).

No petition for rehearing was filed in the court of appeals. Although the petitioners made two motions for extensions of time to petition the court of appeals for a

rehearing, the second of which was denied by the court,[1] no petition for rehearing was ever filed, and the motions for extension of time, of course, did not toll the time to file a petition for a writ of certiorari. See, *e.g.*, *Morse* v. *United States*, 270 U.S. 151, 153-154. Cf. also *Bowman* v. *Loperena*, 311 U.S. 262, 266; *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498.

To be sure, on December 12, 1977—after the time in which the petitioners could have sought a rehearing in the court of appeals, as extended by that court, had expired—the petitioners filed an "Application for Remand to Securities and Exchange Commission" (Pet. App. 17-21), and the order denying that application on December 27, 1977 (Pet. App. 23) recites that the court "considered" it. But the present petition for certiorari does not challenge that ruling. Rather, review is sought of "the judgment * * * entered on 3 November 1977" (Pet. 1), the opinion of that date is singled out in the statement as to this Court's jurisdiction (Pet. 2), the "Questions Presented" identify only issues relevant to the November judgment (Pet. 2-3), and the argument in support likewise does not address the only new matter raised by the motion for remand (Pet. 6-9).

Nor is this mere oversight. There is no suggestion that petitioners seek a new hearing before the Commission for the purpose of adducing additional evidence. What they ask of this Court is a ruling that reaches questions of a right to representation, the required standard of proof

[1]On November 14, 1977, the petitioners requested an extension of time until December 7, 1977, in which to petition the court of appeals for a rehearing, and on November 15, 1977, the court granted that motion. On December 7, 1977, the petitioners moved for a further extension of time in which to file their petition for rehearing; the court of appeals denied that motion on December 12, 1977.

and a claim of estoppel—matters that were, or could have been argued in connection with the initial review by the court below.

In these circumstances, the application for remand cannot extend the time allowed by law for the filing of the petition for certiorari. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 207-213; *Department of Banking* v. *Pink*, 317 U.S. 264.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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